IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.653 OF 1999.

Nalini wd/o.M.K.Mahadevan & Ors. .. Appellants

versus

Rajan R.Subramaniam & Ors. .. Respondents.

...

Mr.Shukla for the appellant.

Mr.R.D.Mishra for respondent no.2.

CORAM : D.G. KARNIK, J

DATED : 5th September, 2006.

P.C:-

1. This appeal is directed against the Judgment and Order dated 29/04/1999 passed by the City Civil Court rejecting the motion of the appellant, the original plaintiff, of the restroration of suit under Order 9, Rule 9 of the code of Civil Procedure.

2. The appellants filed a suit, bearing S.C.No.933 of 1982, against respondents in the City Civil Court, Mumbai. The suit was listed for hearing on 13/04/1999.

On that day, when the suit was called out, the appellants and their advocate were absent and the suit was dismissed in default under Order 9, Rule 8 of the code of Civil Procedure.

3. On the same day, the appellants took out a motion, bearing Notice of Motion No. 2063 of 1999, for seting aside the order of dismissal and restoration of the suit to file. In the motion the appellants filed two affidavits. The first was the affidavit of the advocate who affirmed that when the matter was called out he was busy in Court Room No.22 and therefore could not reach when the matter was called. Immediately and thereafter he appeared in the matter and prayed for restoration of the suit but the court direced him to take appropriate steps for restoration of the suit. The second affidavit was filed by the original plaintiff no. 3 on behalf of himself and other plaintiffs.

4. It is trite saying that a litigant should not suffer on account of negligence of an advocate. The advocate of the appellants should have made arrangements of mentioning the matter when the suit was called out. By not making arrangements of mentioning, the advocate was negligent. However, on that count the

appellants should not suffer. The respondents can be compensated by awarding costs. The trial Court erred by not restoring suit subject to awarding suffering costs to the respondents.

5. For these reasons the appeal is allowed. The impugned order is set aside and the suit bearing no. 7350 of 1988 is restored to file. The appellant shall pay costs of Rs. 2,000/- to the respondent within a period of four weeks either, directly or by depositing them in the court.

6. All concerned to act upon an authenticated copy of this order.

(D.G. KARNIK, J.)